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Supreme Court, U.S.
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No. 02-204

IN THE
Supreme Court of the United States

RODOSVALDO POZO,

Petitioner,

v.

GARY McCAUGHTRY, RANDALL GERRITSON, and DAVID HAUTAMAKI,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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Respondents' opposition fails to confront satisfactorily Pozo's showing in his petition that review of the Seventh Circuit's decision is warranted for three separate reasons: (a) the decision conflicts with the long line of decisions of this Court holding that to be an adequate ground of decision, the state's procedural rule must be both firmly established and regularly followed; (b) the decision contradicts this Court's prior decisions holding that a petitioner's procedural default is excused upon a showing of cause and prejudice or to prevent a fundamental miscarriage of justice; and (c) the decision conflicts with the Ninth Circuit's decision in *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996). Respondents do not

dispute that, in several respects, the Seventh Circuit's decision departs from this Court's prior exhaustion decisions. Nor do respondents dispute the substantial importance of the federal questions presented or the influence that the Seventh Circuit's decision will have on the resolution of those questions in federal courts across the nation. By their silence, respondents effectively acknowledge that this case is well-suited for Supreme Court review

Indeed, if anything, respondents' opposition confirms affirmatively that the case for Supreme Court review is compelling by conceding just how extreme the Seventh Circuit's decision is. Respondents acknowledge that the Seventh Circuit construed § 1997e(a)'s exhaustion requirement as being *more strict* than the habeas exhaustion requirement, and in addition, respondents argue that this "should be" the case. (Resp. Br. 10-15.) So according to respondents, the Seventh Circuit was absolutely right to conclude that federal courts must accord more respect and deference to a Warden's handling of an internal prison grievance than those courts must give to the final judgments of state courts. Simply stating the extraordinary position adopted by the Seventh Circuit confirms the need for Supreme Court review. Respondents' arguments to the contrary do not change that conclusion:

1. Respondents begin with a recitation of the history and purpose of the administrative exhaustion requirement. (Resp. Br. 2-6.) But that recitation is beside the point because it does not address the issue at hand — whether the Seventh Circuit's decision presents important federal questions that warrant review.

2. The appropriateness of Supreme Court review also does not depend on whether the Seventh Circuit's decision, as

respondents argue, is "consistent" with three other court of appeals decisions. (Resp. Br. 6-9.) In any event, those decisions are materially distinguishable because the inmate in each either failed to file a timely grievance or failed to appeal the rejection of that grievance. *See Harper v. Jenkin*, 179 F.3d 1311, 1312 (11th Cir. 1999) (inmate did not appeal); *Wright v. Morris*, 111 F.3d 414, 417 n.3 (6th Cir. 1997) (same); *Marsh v. Jones*, 53 F.3d 707, 708 (5th Cir. 1995) (inmate failed to file timely grievance). Here, in contrast, Pozo indisputably filed timely grievances and also pursued appeals that prison authorities were free to consider in their discretion pursuant to Wis. Admin. Code § DOC 310.13(3).

3. Next, in the process of arguing that the Seventh Circuit's decision is "analogous" to this Court's procedural default decisions, respondents acknowledge that the Seventh Circuit construed the administrative exhaustion requirement as being more strict than the habeas exhaustion requirement. (Resp. Br. 10-15.) By itself, as observed above, that concession confirms that Supreme Court review is appropriate given that there is *no* basis for interpreting the administrative exhaustion requirement of § 1997e(a) to be more difficult to satisfy than the habeas exhaustion requirement. Because a habeas petition is a collateral attack on a completed course of state court adjudications, considerations of federalism and comity demand a stringent exhaustion rule, to ensure that the petitioner has enabled the state judicial system to correct its purported errors before proceeding to federal court. A § 1983 action, in contrast, is *not* a collateral attack on a state court judgment. As a result, the administrative exhaustion requirement never has been viewed to be as important or as strict as the exhaustion requirement in the habeas corpus context — at least not until the Seventh Circuit announced its decision in this case.

4. Respondents argue that the Seventh Circuit's determination to reach the opposite result from the Ninth Circuit in *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996), does not create a circuit split warranting review, purportedly because *Morales* is distinguishable. According to respondents, that is so because the California state rule construed in *Morales* (which provided that state habeas petitions should be filed "without substantial delay") is different from Wis. Admin. Code § DOC 310.13(1), which supposedly "provides a clear 10-day time limit for appeal." (Resp. Br. 18-21.) But that argument ignores § 310.13(3), which states that a late appeal may be considered if the passage of time has not made it "difficult" or "impossible" to consider the claim. That provision, like the one construed in *Morales*, lacks the clarity and certainty the law requires.

Even more important, however, respondents overlook the fundamental flaw in the Seventh Circuit's decision. The flaw is that the Seventh Circuit deemed the question considered by the *Morales* court — whether the state procedural rule purportedly supplying the adequate state ground of decision was "firmly established and regularly followed" — entirely immaterial and unnecessary to address. The Seventh Circuit thereby created a conflict not only with *Morales*, but also with this Court's cases holding that a state procedural rule must be both "firmly established and regularly followed" before it can supply an adequate ground of decision. *See Lee v. Kemna*, 534 U.S. 362, 122 S. Ct. 877, 885 (2002); *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *James v. Kentucky*, 466 U.S. 341, 348 (1984).

5. Respondents' last contention is that Pozo's waived his challenge to the Seventh Circuit's disregard of the "cause and

prejudice" exception to the doctrine of procedural default because he failed to raise that challenge during the proceedings leading to the Seventh Circuit's decision. (Resp. Br. 21.) But that argument ignores that *no one* involved in this appeal could have anticipated the unprecedented twists and turns that the Seventh Circuit would take in its written decision. Pozo did not waive his argument by failing to anticipate the Seventh Circuit's extraordinary departure from the governing law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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